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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 438

BROWN LAND & ROYALTY COMPANY, INC.,
Petitioner,

vs.

FRANCES CLARK GREEN, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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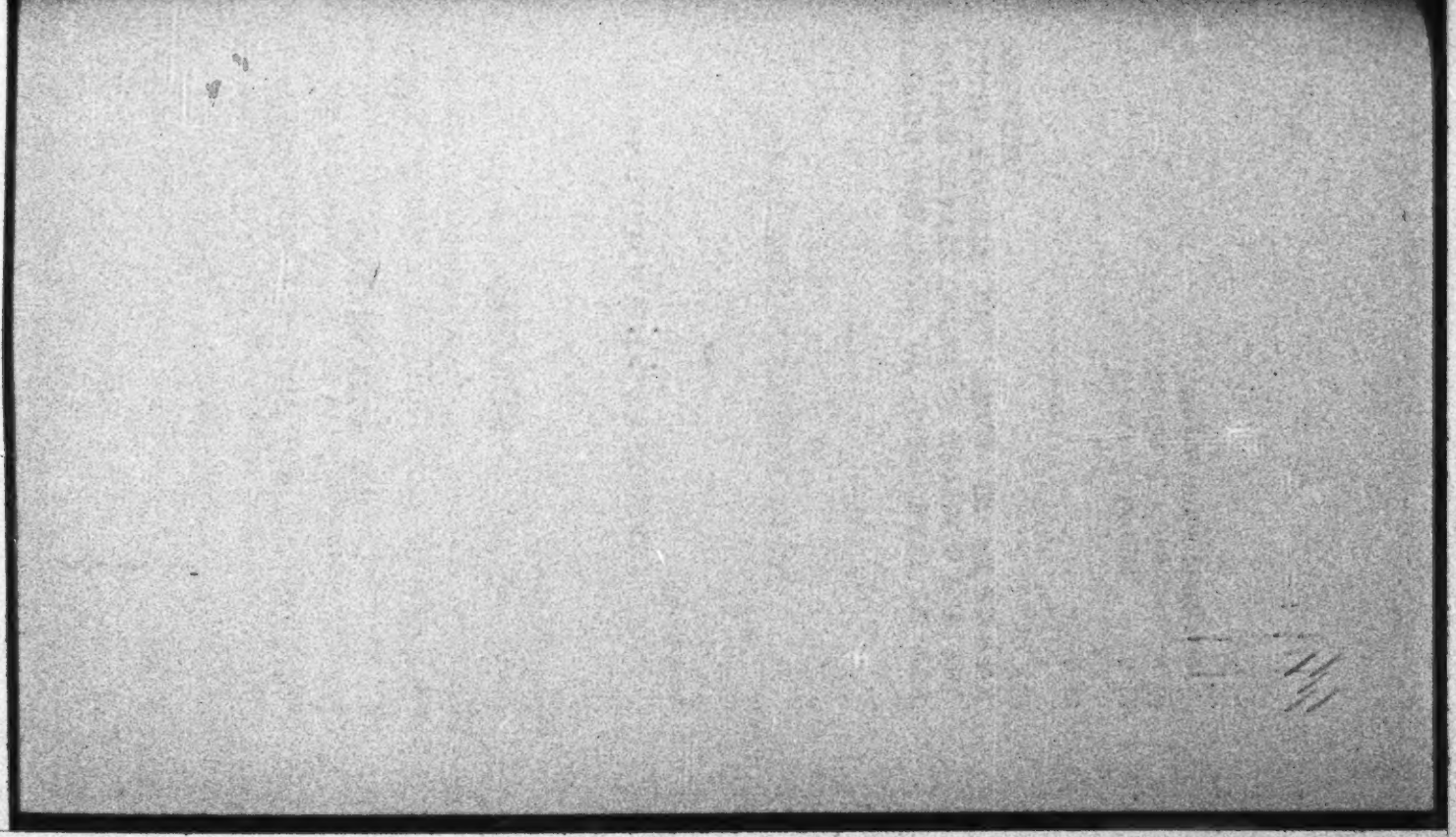

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 438

BROWN LAND & ROYALTY COMPANY, INC.,
Petitioner,

vs.

FRANCES CLARK GREEN, ET AL.,
Defendants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States:

The Brown Land & Royalty Company, Inc., a Delaware corporation, domiciled in Wilmington, Delaware, having its principal offices in Dallas, Texas, files this petition and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on July 18, 1952, petition for a rehearing having been denied on September 2, 1952. The proceeding was instituted as an action in jactitation or slander of title by the six children and heirs of Calvin E. Clark, deceased, and against present petitioner in the State Court sitting in Pointe Coupee Parish, Louisiana and the case was removed

to the United States District Court for the Eastern District of Louisiana on the ground of diversity of citizenship. Petitioner converted the suit into a petitory action by asserting title in itself to one-half of the minerals under the property by reason of a purchase by its ancestor in title, Clifford H. Brown, from Mrs. Marie Clark. Petitioner made The Texas Company defendant in counterclaim and pleaded estoppel based upon a declaration of ownership of one-half of the minerals by Mrs. Marie Clark, executed and recorded by the Clark heirs and by The Texas Company, (Record Page 30) relying also upon a declaration by one of the Clark heirs that Mrs. Clark owned one-half the minerals and might sell such interest if she chose. (Article 19 of Counterclaim, Record Page 26.) The original plaintiffs and The Texas Company filed motions to dismiss which were sustained by the District Judge without giving written reasons. This decision was appealed to the Court of Appeals for the Fifth Circuit which affirmed the action of the District Court.

Opinions Below

The opinion of the Circuit Court of Appeals is published in 198 Fed. (2d), Pages 74 to 77 and a copy thereof appears in the record at page 14.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Section 1254, Title 28, U.S.C.A.

Statement

Mrs. Marie M. Clark, mother of original plaintiffs and the widow of Calvin E. Clark, deceased, conveyed a one-half interest in the minerals under the property in question to Clifford H. Brown on November 25, 1947, and Brown in turn conveyed the same interest to the petitioner here. On

October 9, 1944, Mrs. Marie M. Clark and her six (6) children, present defendants, executed and recorded a Declaration of Ownership which appears in full on Page 30 of the Record and reads in part as follows:

> "Whereas, it is the desire of all of the parties to said lease and to this agreement to specifically set out and designate the interest or interests owned in and to the rentals, royalties and/or other sums which may be due or payable under the terms of said lease.
>
> "Now, therefore, we, the hereinabove named and undersigned lessors, do declare and certify that we are the legal owners of the oil, gas and other minerals in and under the hereinabove described property which is held and covered by the hereinabove described leasee and we agree, declare and authorize The Texas Company to pay any and all bonus money, rentals and/or royalties accruing under the terms of the hereinabove described lease in the proportions hereinbelow set forth, and that all payment so made shall fully protect said lease and The Texas Company as to the respective interests:

Owner	Fractional Interest
Mrs. Marie M. Clark	1/2
Florena Thomas	1/12
Francis Green	1/12
Hattie Pickett	1/12
Agnes Worsham	1/12
Samuel H. Clark	1/12
Torel E. Clark	1/12

> "This agreement is and shall be binding on our heirs, executors administrators *and/or assigns.*" (Emphasis ours.)

The lease referred to in the instrument just quoted was dated October 15, 1943, and was owned by The Texas Company (Record Pages 72 to 87). It was cancelled without notice to Clifford H. Brown or present petitioner and a new

lease was made in favor of The Texas Company on May 18, 1948 by the Clark heirs alone, at a time when petitioner owned royalties purchased from Mrs. Clark, under the original lease, which had not yet expired.

Prior to the execution of the Declaration of Ownership the present defendants had executed an Act of Donation dated September 30, 1922, which present petitioner contends had the effect of vesting a complete title in Mrs. Marie M. Clark, or which, in any event, justified the introduction of testimony to show the intention of the parties if its meaning was doubtful. This instrument appears in full on Pages 38 and 39 of the Record and reads in part as follows:

> "Appearers further declare that they do hereby grant, give, and bequeath unto their mother, Mrs. Marie Clark, widow of their deceased father, Calvin E. Clark, all their interest in and to their father's property, *both* real and personal, for her use during the rest of her natural life.
>
> "Appearers further declare that they do hereby empower and instruct their mother, Mrs. Marie Clark, to collect all accounts due said estate, to pay any and all indebtedness outstanding against same, and whatever balance may be on hand after liquidating said indebtedness, to be used by her as she may deem best in providing for her needs and requirements during the remainder of her natural life, leaving the property without a *well* at her death."

These instruments were all of record in Pointe Coupee Parish, Louisiana at the time Clifford H. Brown acquired the minerals from Mrs. Marie M. Clark, relying on the Public Records.

Questions Presented

1. That the judgment of the Court of Appeals deprived petitioner herein of its right to rely upon the Declaration of Ownership and upon the established rule that a purchaser

in good faith may act upon the Public Records, contrary to its own decision in *McLean* v. *Texas Company*, 103 Fed. 2d 989, to that of the Supreme Court of the United States in *Jouann* v. *Divoll*, 154 U. S. 657, and contrary to the decisions of the Louisiana Supreme Court in *Jackson* v. *United Gas Public Service Company*, 196 La. 1, 198 So. 633, *Burns* v. *Rivero*, 192 La. 767, 189 So. 129, *Mims* v. *Sample*, 191 La. 677, 186 So. 66, and *Brown* v. *Sugar Creek Syndicate*, 195 La. 865, 197 So. 583; that the judgment of the Court of Appeals is also in conflict with that of the Louisiana Court of Appeals in *Robbins* v. *Martin*, 138 So. 132, which case has been cited approvingly by the Supreme Court of Louisiana in the *Brown* and *Jackson* cases, *supra*, and sets forth the Louisiana law today.

2. That the Court of Appeals in holding that the act of donation conveyed an usufruct only, held contrary to the latest controlling decisions of the Supreme Court of Louisiana, namely *Succession of Williams*, 169 La. 696, 125 So. 858, and *Succession of Ledbetter*, 147 La. 771, 85 So. 908. That in making said ruling the Court of Appeals overlooked the fact that the declaration of ownership and the mineral lease, executed by defendants and Mrs. Clark, constituted interpretations of the act of donation and showed that it transferred a complete title because if the donation was only of an usufruct the mineral interest did not pass. Article 552 of the Louisiana Civil Code states (referring to the usufructuary) "but he has no right to mines and quarries not opened", and the Supreme Court of Louisiana in *Elder* v. *Ellerbe*, 135 La. 990, 66 So. 337, and *Gulf Refining Company* v. *Garrett*, 209 La. 274, 25 So. (2d) 329, held that this rule applies to oil wells not opened. On the contrary, if the donation was of the fee title as understood by Clifford H. Brown, the mineral interest, being an integral part of the property, passed to Mrs. Marie Clark.

3. As a matter of fundamental law a restricted meaning should not be placed on a grant where subsequent acts between the same parties contradict such narrow construction. The present defendants and Mrs. Marie Clark having interpreted the written agreements in a way contrary to the findings of the Court of Appeals, present petitioner, both under the Louisiana Civil Code and the Federal Rules of Civil Procedure, is entitled to offer evidence and to cross-examine its opponents and the opinion of the Court of Appeals denies this right and hence deprives petitioner of due process of law, said ruling of the Court of Appeals being in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Muliens* v. *Fitz Simmons and Connell Dredge & Dock Co.*, (7th C.C.A.) 172 Fed. (2d) 601, and the decision of the Court of Appeals for the Eighth Circuit in *Publicity Building Realty Corp.* v. *Hannegan*, (8th C.C.A.) 39 Fed. (2d) 171, and with the reasoning of the Supreme Court of the United States in *Sartor* v. *Arkansas Natural Gas Co.*, 321 U. S. 620.

4. That under the Louisiana law an heir who tacitly or expressly accepts the succession of an ancestor becomes bound by the warranties of that ancestor, and the decision of the Court of Appeals deprives petitioner here of its right to ascertain by cross-examining its opponents whether they or any of them, have tacitly accepted Mrs. Marie Clark's succession and become bound by her warranty to Clifford H. Brown, present petitioner's ancestor in title.

Reasons for Granting the Writ

1. The declaration of ownership was an acknowledged private act which Article 2242 of the Louisiana Civil Code says is entitled to the same credit as an authentic act which is defined as follows by Article 2236 of the Louisiana Civil Code:

> "The authentic act is full proof of the agreement contained in it, against the contracting parties and

their heirs or assigns, unless it be declared and proved a forgery."

The statement of the case made by the Court of Appeals emphasizes near the bottom of Page 75, 198 Fed. (2d), these words:

"Owner	Fractional Interest
Mrs. Marie M. Clark	1/2, etc."

In its answer to this slander of title suit, present petitioner showed it to be an acknowledged private act and set forth the instrument showing that all parties had recognized Mrs. Clark as an owner of one-half the minerals. It is not disputed that the declaration of ownership was recorded November 18, 1944, and was of record November 25, 1947 when Clifford H. Brown, relying upon its recognition and existence, acquired one-half the minerals from Mrs. Marie Clark. The present decision on the motion to dismiss is a final decision under Rule 41 (b) of the Federal Rules of Civil Procedure and the decision of the Court of Appeals in declining to grant petitioner the protection accorded bona fide purchasers relying upon the public records and in depriving it of the right to offer evidence and to cross-examine its opponents amounts to a deprivation of property without due process of law and is in conflict with the decisions of the United States Courts of Appeals for the Seventh and Eighth Circuits in the *Mullens* and *Hannegan* cases, supra. That the decision of the Court of Appeals is likewise in conflict with the reasoning of the United States Supreme Court in the *Sartor* case, supra.

2. The judgment of the Court of Appeals is in conflict with and has failed to follow the latest applicable decisions of the Supreme Court of Louisiana on two questions of local importance. First, the Court of Appeals decided that the act of donation by present defendants to their mother Mrs. Marie Clark, was the transfer of an usufruct only. In so holding the Court disregarded the interpretation placed

upon the act of donation not only by the acts of the parties, but by the execution and recordation of the declaration of ownership and the mineral lease of October 15, 1943, which instruments serve to explain the donation as tranferring a fee title since both of these later instruments refer to a mineral interest which term under Article 741 of the Civil Code of Louisiana, means "an interest in the mineral rights". Since the granting of an usufruct does not vest a right to "mines not opened", under Louisiana Civil Code Article 552, the Supreme Court of Louisiana having held in *Elder* v. *Ellerbe*, supra, and *Gulf Refining Co.* v. *Garrett*, supra, that the word "mines" includes oil wells not opened, it is obvious that the execution of the declaration of ownership and the mineral lease show that the intention of the donors was to transfer a complete title. Second, the Court of Appeals failed to apply and follow the decisions cited above in Paragraph 1 under Questions Presented.

3. That beyond and aside from present petitioner's right to offer oral and other evidence to show the true intention of the parties to these instruments, it is entitled on trial to show a tacit acceptance of Mrs. Marie M. Clark's succession by her children so as to bind them under her warranty to present petitioner's predecessor in title and the denial to this petitioner of its right to such trial deprives it of valuable property without an opportunity to be heard.

4. The judgment of the Court of Appeals is based on interpretations different from that accorded the two instruments by the parties themselves who interpreted them as conveying a complete title to Mrs. Marie M. Clark as shown by acts detailed in the brief which follows this petition as an appendix.

5. The Court of Appeals indicated that the recital in the act of donation that grantor was conveying her part of the community estate had some bearing upon the decision and

assumed that the words "community estate" referred to the marital community. This was incorrect because the marital community was dissolved by the death of Calvin E. Clark and the proper construction of the words used would be that the community interest referred to was born of the common ownership by the heirs and their mother of the mineral interest. In addition even though Mrs. Clark might have thought she owned a marital community interest in the minerals that could have no legal effect in the proper decision of this case because she executed a warranty deed to Clifford H. Brown and became bound to stand behind her deed regardless of where she might have acquired the property she conveyed. The Court of Appeals referred to the concession by petitioner that under Louisiana law an instrument must be considered as a whole and any ambiguity therein construed against a donee. This concession simply means that after a consideration of all of the evidence available in the Record and of all of the evidence a party was legally authorized to offer, that any ambiguity then remaining was construed against a donee. This concession was made by petitioner by reason of the decision of the Louisiana Supreme Court in *Gulf Refining Co.* v. *Garrett*, supra, but in that case the Supreme Court remanded the matter for the reception of clarifying evidence saying:

> "For the reasons assigned (the original decree and opinion of this Court having been previously vacated by the granting of the rehearing) it is now ordered that the judgment of the Court of Appeal, as well as of the district court, be reversed and set aside and that the case be remanded to the district court for the purpose of hearing and receiving additional evidence respecting the intention of the parties in the execution of the contract of date June 17, 1941."

Conclusion

For the foregoing reasons and the reasons given in brief which follows this petition as an appendix, it is respectfully submitted that this petition should be granted.

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By its Attorneys:

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The judgment of the Court of Appeals was entered on July 18, 1952, (Record Page 18), petition for a rehearing was denied September 2, 1952 (Record Page 29), reported in 198 Fed. (2d), Pages 74 to 77.

The jurisdiction of this Court is invoked under the provisions of Section 1254, Title 28, U.S.C.A. The facts have been fully set forth in Petition for Certiorari, Pages 2 to 4, supra.

Specification of Errors Assigned

I. That the judgment of the Court of Appeals deprived petitioner herein of its right to rely upon and be protected by the Public Records.

II. That the Court erred in holding that the act of donation conveyed an usufruct only and in failing to follow applicable Louisiana authorities.

III. That the judgment of the Court of Appeals denied petitioner due process of law in refusing to order a trial of this case for the purpose of placing evidence in the Record showing the intention of the parties to the declaration of ownership and the act of donation.

IV. That the opinion of the Court below denied present petitioner its right to show that present defendants had tacitly accepted the succession of their mother and become bound by her warranty to your petitioner.

Argument

SPECIFICATION OF ERROR NO. I

The declaration of ownership executed by the six defendants and Mrs. Marie M. Clark declares and certifies that

they are the *legal owners* of the oil, gas and other *minerals* in and under the property there described and directs The Texas Company to pay Mrs. Marie Clark as *owner* one-half of any bonus money, rentals or royalties due under the terms of the lease. That agreement stated that it should be binding on the *assigns of the parties.* This instrument was of record when Clifford H. Brown acquired the minerals involved in this suit from Mrs. Marie Clark on November 25, 1947.

The present six (6) defendants are now contending that Mrs. Marie Clark, their mother, owned nothing and that they own these minerals in equal proportions. The Supreme Court of the United States in *Jouann* v. *Divoll,* 154 U.S. 657, stated:

> "We think the evidence shows that Divoll was induced to make his purchase from Cooke on the representation of Jouann that Cooke was the owner of one-half the claim. For this reason Jouann is now estopped from denying Cooke's title. . . ."

The Louisiana law is the same. In factual situations similar to that presented here the Courts of Louisiana have uniformly held that parties to such a recorded Declaration thereby estopped themselves from claiming a greater interest than that set forth therein, where a purchaser parted with a valuable consideration relying upon the document. In *Jackson* v. *United Gas Public Service Company,* 196 La. 1, 198 So. 633, the Court affirmed this doctrine in the following language:

> "In the case of Mims v. Sample, 191 La. 677, 186 So. 66, we held that where an instrument set up the respective interests of the co-owners in land, the signers thereof were estopped from claiming a greater interest therein where the purchaser of interests in the property relied upon the document and parted with a valuable consideration."

The case of *Burns* v. *Rivero*, 192 La. 767, 189 So. 129, involved a case where the sole heirs of the deceased executed and recorded an instrument recognizing that certain realty was separate property. They later attempted to assert that it was community property, but the Supreme Court of Louisiana refused to allow them to change their position.

In *Brown* v. *Sugar Creek Syndicate*, 195 La. 865, 197 So. 583, an agreement fixing ownerships was executed and recorded. In holding that purchasers relying upon the recorded instrument were protected, the Supreme Court of Louisiana said:

> "*The mineral and royalty owners who acquired their rights on the faith of the public records after the December 31, 1931 agreement was registered are obviously protected. Bell* v. *Canal Bank & Trust Co., supra. Mims et al* v. *Sample et al., supra.*" (Emphasis ours).

All three of these decisions and *Mims vs. Sample* were decided by the Supreme Court of Louisiana within the last fifteen years and so far as we can determine have never been criticized or overruled. Furthermore, the Circuit Court of Appeals for the Fifth Circuit, in *McLean* v. *Texas Company*, 103 Fed. (2d) 989, held that parties claiming benefits under a division order became bound by the guaranty of the signers thereof that they were the legal owners of the oil, even though the claimants themselves did not sign the division order.

The Louisiana Court of Appeals case of *Robbins* v. *Martin*, 138 So. 132, has been cited approvingly on several occasions by the Louisiana Supreme Court, specifically in the *Jackson* and *Brown* cases, supra. There a division order, indistinguishable from the Declaration of Ownership here, was maintained on the theory of estoppel by contract. For

the convenience of the Court we quote the pertinent language of each document:

"Clark Declaration of Ownership or Division Order (Record Page 30)

Now, Therefore, we, the hereinabove named and undersigned lessors, do declare and certify that we are the legal owners of the oil, gas, and other minerals in and under the hereinabove described property which is held and covered by the hereinabove described lease, and we agree, declare and authorize the Texas Company to pay any and all bonus money, rentals and/or royalties accruing under the terms of the hereinabove described lease in the proportions hereinabove set forth, and that all payments so made shall fully protect said lease and The Texas Company as to the respective interests:

Owner	*Fractional Interest*
Marie M. Clark	1/2
Florena Thomas	1/12
Francis Green	1/12
Hattie Pickett	1/12
Agnes Worsham	1/12
Samuel H. Clark	1/12
Torel E. Clark	1/12

"This agreement is and shall be binding on our heirs, executors, administrators and/or assigns."

Robbins v. Martin Division Order (as taken from 138 So. Rep., Page 135)

"To Magnolia Petroleum Company:

"The undersigned certify and guarantee that they are the legal owners of wells numbered one and up, on the Magnolia Petroleum Company Robbins 'B' Farm, more particularly described as the NE¼ of SW¼ of Section 21, Twp. 21 N., Rng. 10 West, Webster Parish, Louisiana, and until further notice you are hereby authorized to receive oil therefrom, giving credit as directed below:

Credit to

Charley Robbins	3/768 R.I.
E. G. Martin	3/768 R.I."

We turn now to a consideration of the reasons given by the Court of Appeals for not applying the above cited decisions in this case. The Court did not cite or discuss any of the Louisiana authorities above referred to although they were cited in argument in that Court.

The Court in disposing of present petitioner's contentions with reference to the declaration of ownership stated that the Louisiana law fixed no particular division of rents or royalties as between an usufructuary and a fee owner.

This statement was manifestly erroneous in view of Article 552 of the Louisiana Civil Code. This provision of statutory law has been interpreted by the Supreme Court of Louisiana on at least two occasions where it was held that an usufructuary was entitled to none of the minerals and a fee owner to all of them. See *Elder* v. *Ellerbe*, 135 La. 990, 66 So. 337, and *Gulf Refining Company* v. *Garrett*, 209 La. 674, 25 So. 2d 239. In the *Garrett* case the Court said on Page 332 of the Southern Reporter:

> "As usufructuary, the widow did not acquire title to the mineral rights, or mineral wealth, in the three-tenths interest inherited by the heirs of the first marriage of John L. Garrett in the eighty acres of land leased to the Gulf Refining Company. Rev. Civ. Code arts. 533 and 552."

Therefore, if Mrs. Marie Clark was an usufructuary owner only it would have been a vain and useless thing to have included her in the declaration of ownership. Furthermore, the reason The Texas Company desired the execution of the division order has nothing to do with the legal results flowing from it.

We respectfully say that the Court of Appeals is in error and does violence to the language of the instrument when it says that the instrument conveyed no title to Mrs. Clark nor recognized any title in her. The instrument in so many words declares and certifies that the parties are the owners of the minerals, setting forth the interest owned by each party.

When the Court said that the instrument divided only the bonus money, rentals and royalties and not the minerals it

not only overlooked certain uncontradicted facts which appear in this Record, but, we believe, misapplied the law. In the first place, the entire lease bonus had already been paid to Mrs. Clark. See Page 2 of the Record. The rentals for the year 1944 were paid to Mrs. Clark in their entirety. See Page 7 of the Record. It was not until 1945 that the half of the rentals stipulated by the instrument were paid to Mrs. Clark. See Page 110 of the Record.

Furthermore, even if the declaration of ownership became a nullity on the cancellation of The Texas Company's lease, as stated by the Court of Appeals, it was nevertheless valid and subsisting when Clifford H. Brown purchased these minerals. Rights acquired by Brown in reliance upon the declarations contained in the instrument could not be divested either by the unrecorded purposes of The Texas Company or by any assumed termination of the instrument at some date subsequent to Brown's purchase.

When the Court of Appeals said that the declaration of ownership divided royalties and not minerals it obviously erred. A person cannot own royalties unless minerals exist on which the royalties are based. This is true because royalty is nothing more nor less than the entire mineral interest less the working interest reserved to a lessee by the terms of a lease. **Therefore, once it be conceded that Mrs. Clark had royalties to divide it necessarily follows that her ownership of a like interest in the minerals was also recognized, in the absence of a showing of an independent purchase by her which is not contended here.**

Of course, it is the law that in cases of this character the law of the State as decided by its highest Court should be applied. U. S. C. A., Title 28, Sec. 1652; *Erie* v. *Tompkins*, 304 U. S. 64, *West* v. *American Telephone and Telegraph Company*, 311 U. S. 223, *Kraus* v. *Greenbarg*, (3rd C.C.A.) 137 Fed. (2d) 569, *Yoder* v. *Nu-Enamel Corporation*, (8th C.C.A.) 117 Fed. (2d) 488.

We suggest that the Court of Appeals has not followed that law in this case. Although a number of applicable decisions from the Supreme Court of Louisiana were called to the attention of the Court of Appeals they were ignored and the Court, as will appear from the opinion appearing on Page 124 of the Record, simply decided the case as it thought the case should be decided. It is the contention of present petitioner that the question presented is not what the Court of Appeals thought the declaration of ownership meant but what the decisions of the Supreme Court of Louisiana show that it meant in view of the previous pronouncements of that Court. **In other words, the decision of the Court of Appeals should have been the same as would have been rendered by the Supreme Court of Louisiana had this case been heard there.**

Specification of Error No. II

Present petitioner has always contended that under Louisiana law the donation instrument operated to convey a fee title to their mother. The Supreme Court of Louisiana in the last five applicable decisions cited by the Court of Appeals in the footnote to its opinion appearing on Page 124 of the Record, so held. It is present petitioner's view that the Supreme Court of Louisiana in *Succession of Williams*, 169 La. 696, 125 So. 858, held that a fee title passed in construing language strikingly similar to that employed in the act of donation.

Furthermore, the acts of the parties following the executing of the act of donation show that their intention was to transfer a complete title. The joinder of Mrs. Marie Clark in the execution of the mineral lease followed by the execution and recordation of the declaration of ownership evidences the belief of the parties that Mrs. Clark had acquired a complete title because if the donation had been of

an usufruct only the mother would not have acquired any minerals and would have been an unnecessary party to the lease and the declaration.

Although the property involved here was acquired by Calvin E. Clark shortly prior to his marriage to Mrs. Marie Clark, the parties thought, as a fact, that it was community property. A recital to this effect appears in the mortgage executed by Mrs. Clark in favor of the Bank of New Roads. This appears at Page 90 of the Record. If the parties thought that this property was community in nature the execution of the donation instrument would have been a vain and useless thing unless it was intended to transfer a fee title, because under Louisiana law the surviving widow with children has the usufruct of the husband's share of the community property.

The present defendants primary intention in executing the act of donation was to see that their mother had proper support and maintenance and it was contemplated that if it should be necessary for that purpose that the property could be used by her as her own. The clause "leaving the property without a will at her death" was precatory in nature, constituting a request that their mother leave whatever part of the property might remain, to them equally and without discrimination between them. Mrs. Clark did convey a mineral interest in the property for the purpose of providing for her needs as referred to in the act of donation at Page 40 of the Record, and did leave the property, less this mineral interest, to descend by operation of the law to her children in equal proportions.

The Court of Appeals not only did not give any consideration to the interpretations of the donation instrument by the parties, but also did not discuss any of the Louisiana cases referred to above saying that it was not the final authority on questions of Louisiana land law. Of course, the

Court of Appeals was the final authority in this case, and its duty was to determine what the Supreme Court of Louisiana had declared the law to be and then to apply that law. We suggest that under the above authorities the Court of Appeals should have held that the instrument transferred a fee title because the Supreme Court of Louisiana had clearly held that the instrument had that legal effect.

We remind the Court that regardless of the interpretation to be accorded the act of donation that present petitioner is nevertheless entitled to judgment in this case by reason of the declaration of ownership. If the act of donation had never been executed at all the declaration of ownership recognized and vested the ownership of one-half the minerals in Mrs. Clark, which minerals have descended to present petitioner.

Before leaving this point we remind Your Honors that under the Louisiana law mineral ownership is distinguished from an usufruct in that the rights of the usufructuary expire at the death of the owner under the provisions of Article 606 of the Louisiana Civil Code, whereas mineral ownership is a servitude which does not so expire. This mineral servitude remains in effect without user for ten years, but remains alive indefinitely if production is secured on the property affected with the servitude. *Frost-Johnson Lumber Co.* v. *Salling's Heirs,* 150 La. 756, 91 So. 207, which case has been uniformly adhered to up to the present time by the Supreme Court of Louisiana.

Specification of Error No. III

The Court of Appeals in interpreting these instruments reached a conclusion entirely inconsistent with the interpretation placed upon these instruments by the parties who executed them. The parties, all of whom are still living except Mrs. Marie Clark, in a number of acts showed that they interpreted the two instruments as creating and rec-

ognizing a fee title in Mrs. Clark. This interpretation by the parties is evidenced by the following facts:

A. That both Mrs. Clark and her daughter, Mrs. Frances Clark Green, stated to the agent of Appellant's ancestor in title, that Mrs. Clark owned a one-half interest in the minerals under the property involved here. (Record Page 26, Article 19 of Counterclaim).

B. That Mrs. Clark joined in the execution of the Paret lease. (Record Page 24).

C. That the entire lease bonus was paid to Mrs. Clark. (Record Page 105).

D. That Mrs. Marie M. Clark repeatedly claimed the Homestead Exemption granted owners of property under the provisions of Paragraph 9, Sec. 4 of Article 10 of Louisiana Constitution for 1921, and Appellees acquiesced in her action from the year 1943 to the time of her death. (Record Page 65).

Under the circumstances of this case it seems perfectly plain that if the intention of the parties was doubtful, present petitioner had a right to introduce extrinsic evidence, oral and otherwise. The right to offer such evidence in cases of this character is authorized under the law of Louisiana and especially by Civil Code Article 1956, which reads as follows:

"When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation."

In discussing this proposition of law the Supreme Court of Louisiana in *Plaquemines Oil & Development Co.* v. *State*, 208 La. 425, 23 So. 2d 171, said:

"It is true that, in the execution of deeds and like instruments, the intentions of the parties must be gathered from inspection of the instrument without the aid of extrinsic evidence, if their intentions can be

thus ascertained, but if an instrument is so ambiguous as to leave the mind in doubt as to what the parties intended, extrinsic evidence may be resorted to as an aid in construction; or, in other words, *when the intent of the parties is doubtful, the construction put upon the instrument by the manner in which it has been executed by both, or by one with express or implied assent of the other, furnishes the rule for its interpretation.* Revised Civil Code, Article 1956; Holloway Gravel Co. *v.* McKowen, 200 La. 917, 9 So. 2d 228; Marcotte *v.* Coco, 12 Rob. 167; Bender *v.* Chew, 129 La. 849, 56 So. 1023; Smith *v.* Chappell, 177 La. 311, 148 So. 242." (Emphasis ours).

The right to offer evidence and to cross-examine a party's opponents is likewise granted by the Federal Rules of Civil Procedure.

The Court of Appeals in this case in dismissing present petitioner's claim without allowing it to offer evidence has deprived petitioner of its day in Court and due process in law because the Federal Courts have repeatedly held that a complaint should not be dismissed unless it appears to a certainty, that a party is not entitled to relief under any state of facts which can be proven. See *Publicity Building Realty Corporation* v. *Hannegan,* (8th C.C.A.) 139 Fed. 2d 583, and *Mullens* v. *Fite Simmons & Connell Dredge & Dock Co.,* (7th C.C.A.) 172 Fed. 2d 601.

This Court in *Sartor* v. *Arkansas Natural Gas Company.* 321 U.S. 620, reversed the Court of Appeals for the Fifth Circuit in a case where a motion for a summary judgment had been sustained, saying:

". . . Rule 56 authorized summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

As we pointed out above all of the parties to these agreements except Mrs. Clark are alive. A trial of this matter should be had and present petitioner given the right of cross-examining these six defendants in order to probe their consciences and endeavor to ascertain what their intentions were in executing these contracts. It cannot be denied that if these defendants on cross-examination testified that they intended to vest and recognize a title in their mother, that petitioner would be entitled to a judgment. It follows that this right of cross-examination and of offering evidence should be granted petitioner by directing a trial on the merits of this case.

Specification of Error No. IV

This point is supplementary to and in emphasis of, Specification of Error No. III.

Under the law of Louisiana an heir who accepts the succession of his ancestor becomes bound by the warranties of that ancestor. Mrs. Clark, having executed a warranty deed to Clifford H. Brown, became bound in warranty and if the present defendants accepted her succession, they likewise became bound. See *Picou vs. Dubois*, (La. App. 1943) 13 So. (2d) 543, where the Court said:

> "It is now well settled that an heir who accepts the succession unconditionally thereby binds himself for the debts or obligations of the deceased persons, the same as if he himself had contracted them. Rev. Civil Code, Arts. 1013 and 1423; Griffing et al. *v.* Taft, 151 La. 442, 91 So. 832, on rehearing; Addison *v.* Kirby Lumber Corporation, La. App., 3 So. 2d 199, 202. Among the obligations for which an unconditional heir is liable is the obligation of warranty, on the part of the deceased person, to defend a title which the decedent has conveyed."

An acceptance may be express or tacit. See Louisiana Civil Code Article 988. A tacit acceptance is evidenced by an heir assuming the quality of owner of the property left by the ancestor. Accordingly, if these six defendants, or any of them, disposed of any of their mother's property as owner following her death, then such of them as did this became bound by her warranty and, as to those defendants this petitioner would prevail regardless of the legal effect of the two instruments under consideration.

On trial of this case, if a trial should be ordered, present petitioner would have an opportunity to examine these defendants and ascertain what disposition was made of their mother's property and whether they all, or any of them, disposed of the property in the capacity of owner. The action of the Court of Appeals in affirming action of the District Court dismissing this case deprived present petitioner of the opportunity to show that these defendants have become bound by their mother's warranty.

Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit in *Publicity Building Realty Corporation* v. *Hannegan*, supra, said, as appears from Page 586 of the report:

> "This Court has repeatedly said that a motion to dismiss a complaint should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim." (Citing various authorities).

It cannot be denied that under Louisiana law acts of ownership by an heir constitute an acceptance of the succession of their ancestor, binding the heir with the warranties of the ancestor. It cannot be denied that if the intention of these people to vest and recognize a fee title in their mother should be made to appear by their own testi-

mony on a trial that present petitioner would be entitled to relief. Hence the law as stated by Judge Sanborn applies and the action of the Court in this case was erroneous.

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

NO. 438

BROWN LAND & ROYALTY COMPANY, INC.,
Petitioner and Appellant below,

VERSUS

FRANCES CLARK GREEN, ET AL.,
Respondents and Appellees below.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS, APPELLEES BELOW FRANCES CLARK GREEN, ET AL.

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To the Honorable the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has been reported in 198 F. 2d 74-77, and is found at page 14 of the Record.

GROUNDS ON WHICH JURISDICTION IS INVOKED BY PETITIONER

Petitioner seeks a writ of certiorari under Title 28, U.S.C., Section 1254.

ARGUMENT

PETITIONER'S SPECIFICATION OF ERROR NO. I.

Petitioner contends that the Court of Appeals deprived it of its right to rely upon and be protected by the Public Records.

Nothing said by the Court of Appeals does violence to the rule that an innocent purchaser for value is entitled to rely upon the public records. The Court of Appeals did properly hold, in accordance with applicable Louisiana decisions, that the documents allegedly relied on by petitioner and recorded in the public records did not divest respondents of their mineral rights or recognize those mineral rights in anyone other than respondents.

The decisions which petitioner says were "ignored" by the Court of Appeals, of course, were not ignored. They were all thoroughly discussed in voluminous briefs and in extensive oral argument before the Court. The Court concluded, properly, that what petitioner considered to be applicable decisions in support of its position were not, in fact, applicable, and did not support petitioner.

PETITIONER'S SPECIFICATION OF ERROR NO. II.

Here petitioner asserts that the Court of Appeals erred in holding that the instrument relied upon by petitioner trans-

ferred a usufruct only, and further erred in failing to follow "applicable Louisiana authorities."

The opinion of the Court of Appeals demonstrates the lack of merit in this contention of petitioner. The Court of Appeals did not, as petitioner says, fail to discuss "any of the Louisiana cases referred to." The Court of Appeals makes specific reference to the cases relied on there by petitioner-appellant, and specifically stated that its conclusion was reached "after carefully considering the authorities relied upon by the appellant and those relied on by the appellees. . . ."

The simple proposition is that petitioner argued below that certain Louisiana decisions controlled this case favorably to petitioner; the Court of Appeals studied the matter thoroughly, carefully considered the cases relied on by petitioner, and held otherwise. What petitioner apparently would have Your Honors do would be to consider this case as one of first impression, study all the cases relied on by both sides anew, and redetermine the case as if it were being heard for the first time on appeal. We respectfully submit that certiorari should not be granted on that basis.

PETITIONER'S SPECIFICATION OF ERROR NO. III

Next, says petitioner, it was denied due process of law because there was no trial ordered at which it could have placed evidence in the Record showing the intention of the parties.

The points made by alleged Error No. III, as well as by alleged Error No. IV to be discussed infra, were not urged by petitioner in the Court of Appeals. Its Statement of Points, found on page 100 of the Record, makes no reference whatever to petitioner's present contention that it wanted to offer

evidence of intention. Nor is this argument made in any of the briefs filed by petitioner in the Court of Appeals. It could hardly be correctly said that the Court of Appeals erred when petitioner, appellant below, failed to ask the Court of Appeals to consider the question now raised. As more fully shown hereafter, we believe the great weight of authority is to the effect that even if a litigant urges a matter in a District Court, if on appeal he abandons it by failing to assert it as appellant, he should not be permitted to base a petition for certiorari on that point.

By pretermitting that, any such evidence as petitioner now says it should be permitted to offer would be clearly inadmissible. As was fully shown by briefs below, this is a petitory action where petitioner here must rely on the strength of its own title, as shown by the instruments which are recorded in the public records. Evidence as to what the parties may have intended by the written instruments would not be admitted.

See:

Ker v. Eversheд (1889), 41 La. Ann. 15, 6 So. 566

Bank of Napoleonville v. Knoblock & Rainold (1918), 144 La. 100, 80 So. 214

Landeche Bros. Co., Ltd. v. N.O. Coffee Co., Ltd. (1931), 173 La. 701, 138 So. 513

McGuire v. Nelson Bros. (1933), 177 La. 302, 148 So. 56

Planters Fertilizer & Chemical Co. v. Barton (1920), 147 La. 15, 84 So. 440

Vaughan v. McInerney & Co., et al. (1943), 12 So. 2d 516

Blackman v. Wainer (1944), 19 So. 2d 678

Weinberger v. Merchant's Ins. Co. (1889), 41 La. Ann. 31, 5 So. 728

The Court of Appeals concluded as a matter of law, based upon truly applicable Louisiana decisions, that it was "under the clear conviction that the 'donation' evidences the transfer of a usufruct only and not a fee title." The instrument itself controlled; under those circumstances no parol evidence whatever would be admissible.

PETITIONER'S SPECIFICATION OF ERROR NO. IV

As applied to the facts of this case the matter here raised has no more substance than the others relied on by petitioner. However, we deem it unnecessary to engage in extensive discussion of this point here.

The contention raised by this Specification of alleged Error was never alleged nor intimated by the pleadings in the District Court; it was never presented in argument or brief in the District Court; it was not included in the Statement of Points filed by petitioner-appellant; nor was it ever mentioned in oral argument or briefs in the Court of Appeals.

Petitioner now mentions this point for the very first time, and seeks to inject it into this case in petition for certiorari. We submit that this cannot be done—certainly not in this type of case.

It is well settled that in the absence of some pressing and compelling reason (which certainly does not exist here), a matter not presented to the Courts below cannot be raised for the first time on appeal or in petition for certiorari. There are many sound reasons for this rule and they take on more significance when the new matter appears for the first time

in an application for certiorari to this Court. The cases which announce this rule are many. Among them are:

Duignan v. United States et al. (1927), 47 S. Ct. 566, 274 U.S. 195

Board of Commissioners for the Atchafalaya Basin Levee District v. Smyth (1951), 187 F. 2d 11, cert. den. 72 S. Ct. 39, 342 U.S. 821

New York Life Ins. Co. v. Calhoun (1940), 114 F. 2d 526, cert. den. 61 S. Ct. 141, 311 U.S. 701

Chatz v. Midco Oil Corp. (1945), 152 F. 2d 153, cert. den. 67 S. Ct. 49, 329 U.S. 717; reh. den. 67 S. Ct. 181, 329 U.S. 825.

CONCLUSION

This case has been thoroughly briefed, argued, and considered below in all its phases. It involves a Louisiana land title. Petitioner caused the case to be removed to the United States District Court, and by counterclaim assumed the burden of a plaintiff in a petitory action.

The case was decided adversely to petitioner by the District Judge who is a competent and experienced Louisiana attorney. This decision was upheld by the Court of Appeals after full consideration, after having had the benefit of elaborate briefs and oral argument. A determination of which Louisiana decisions were applicable was made by the Court of Appeals, as its opinion plainly states, and those decisions were followed.

We submit that Your Honors should not be called upon, on petition for certiorari, to redetermine all issues presented below and also new issues injected here, and then to deter-

mine whether the Court of Appeals was, in your judgment, right or wrong. Even if the views of this Court do not coincide with those of the Court of Appeals, this is not ground in itself for granting certiorari. Denial of certiorari carries no implication of support of the judgment below or the views in the opinion supporting it. See:

State of Maryland v. Baltimore Radio Show (1950), 70 S. Ct. 252, 338 U.S. 912

Agoston v. Commonwealth of Pennsylvania (1950), 71 S. Ct. 9, 340 U.S. 844.

We submit that none of the reasons suggested by Rule 38, paragraph 5, of the Rules of this Court, exist here for granting certiorari; and there are no other special or important reasons which call for this case to be reviewed on certiorari.

For these reasons and the reasons set out in the briefs of these respondents filed in the Court of Appeals for the Fifth Circuit, it is submitted that the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing brief have this day been served upon each counsel for petitioner by mailing same, postage prepaid, to Robert G. Chandler, Esq., Attorney at Law, 918 Commercial Building, Shreveport, Louisiana, and to Frank J. Looney, Esq., Attorney at Law, 615 Herndon Avenue, Shreveport, Louisiana, Attorneys of Record for petitioner.

Baton Rouge, Louisiana, this 15th day of December, 1952.

RICHARD C. CADWALLADER,
Counsel for Respondents above named.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 438

BROWN LAND & ROYALTY COMPANY, INC.
Petitioner

vs.

FRANCES CLARK GREEN, ET AL

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

May It Please The Court:

Having just received a copy of the brief filed on behalf of respondents and appellees, we note that it is contended in discussing petitioner's Specifications of Error Nos. III and IV, that it was not contended in the Court of Appeals that petitioner desired to offer evidence and that the argument was not made in any of the briefs filed by petitioner in that Court. While this statement is doubtless made in good faith it is entirely incorrect. As a matter of fact at the very outset of its argument on

motion for a rehearing in the Court of Appeals petitioner said:

> *"MAY IT PLEASE THE COURT:*
>
> We respectfully suggest that the effect of Your Honors ruling is to deny Appellant its right to be heard, to offer evidence, and to cross examine its opponents. What this Court has done, in effect, is to say that under no conceivable situation could any evidence be produced which would have the effect of showing that the intention of Appellees was to convey a fee title to their mother. In addition to the facts alleged in the pleadings, which are taken to be true on this motion, and which show that the intention of these people was to vest a title in the donee, it is also possible that in cross examination of Appellees they could be compelled to admit that their purpose was to give a complete title to Mrs. Clark. It may very well be that the possibility of such an admission is not great but this Court's ruling deprives Appellant of the fundamental right to attempt to secure such an admission and to probe the consciences of its opponents. Let us assume that a trial of this matter is had and that one or more of the Appellees testify that it was their intention to give the property involved completely and in fee simple to their mother. In such a situation can it be denied that this intention of the parties would prevail and that a fee title in fact did vest in Mrs. Clark? And is it proper for this Court to make a ruling which takes for granted such a situation cannot occur?"

Despite this contention the Court of Appeals failed to grant petitioner the relief it sought.

As stated in our original brief the point covered by Specification of Error No. IV is supplementary to and in emphasis of Specification of Error No. III. Accordingly, both points were brought to the attention of the Court of Appeals as above indicated.

In any event, the question presented here is whether this petitioner was entitled to a trial and in passing on the propriety of granting a motion to dismiss the well pleaded facts are accepted as the hypothesis of decision by this Court. *Collins vs. Hardyman*, 341 U.S. 651.

In closing we suggest that the prayer of respondents' brief is possibly violative of Section 3, Rule 7 of the Rules of this Court.

Respectfully submitted,

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By its Attorneys:

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the above and foregoing brief have this day been served upon each counsel for respondents by mailing same, postage prepaid, to Richard C. Cadwallader, Louisiana National Bank Building, Baton Rouge, Louisiana, and D. Douglas Howard,c/o Legal Department, The Texas Company, New Orleans, Louisiana, said counsel respectively representing the heirs of Calvin E. Clark and The Texas Company, respondents and appellees.

Shreveport, Louisiana, this_____day of December, 1952.

_____

Frank J. Looney
Attorney for Petitioner, Brown Land & Royalty Company, Inc.